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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

Nos. 1022-1023

WOODVILLE, OKLAHOMA, AND NEW WOODVILLE, OKLAHOMA,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

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Petitioners pray that Writs of Certiorari issue to review the judgments of the United States Circuit Court of Appeals for the Tenth Circuit entered on January 3rd, 1946 (R. 145-146) affirming the judgment of the District Court of the United States for the Eastern District of Oklahoma on Appeal and Reversing the Judgment of said District Court on Cross-appeal.

Opinions Below

Judge Broaddus, the District Judge, did not write an opinion. He did make findings of fact and Conclusions of Law with footnotes (R. 38-46). The opinion in the Cir-

cuit Court of Appeals (R. 139-145) may be found in 152 Fed. 2nd 735.

Jurisdiction

The judgments of the Circuit Court of Appeals were entered January 3rd, 1946. The Jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925.

Questions Presented

On the 29th day of January, 1945 Respondent filed a Condemnation suit to take the property of Petitioners (R. 2-12). February 1, 1945 Respondent filed a declaration of taking (R. 12-15), as authorized by 40 U. S. C. 258a, and on the same day the District Court entered an order appropriating the property (R. 15-18). Three months prior to the filing of the Condemnation suit Respondent had actually appropriated the property by inundating it with water from six to thirty feet deep.

Briefly stated the property taken consisted of the following:

I

15.74 acres of right-of-way acquired by the Railroad Company under section 13 of the Act of Congress of February 28, 1902 (32 Stat. 43, 47) and which reverted to the town of Woodville, Oklahoma, upon abandonment as provided by Section 14 of the Act of Congress of April 26, 1906 (37 Stat. 137) with an agreed value of $300.00.

II

61.8 acres of easements for roads, streets and alleys with a replacement value of $2,472.00.

III

Eight wood culverts; eight galvanized iron culverts; ten concrete culverts with a sound value (cost of construction less depreciation) of $4,498.97 (R. 123-125).

IV

3,657 square feet of street crossing with a sound value of $706.38 (R. 127).

V

22,891 square feet of sidewalks with sound value of $2,-350.74 (R. 128).

VI

924 lineal feet of curb with sound value of $138.60 (R. 128).

VII

1890 cubic yards of gravel surfacing with sound value of $1,663.20 (R. 128).

VIII

One water well and cost of moving jail valued from $517.00 to $1,217.00.

The Questions Presented Are:

1. Whether since the condemning authority purchased or took by Condemnation, all the Real Property of the Town of Woodville, Oklahoma, it became thereby entitled to take the public property consisting of the above for a nominal consideration of $1.00.

2. Whether, upon abandonment, by the Railroad, the land covered by the right-of-way reverted to the town of Woodville, Oklahoma.

Statutes and Constitutional Provisions Involved

There is involved herein that part of the Fifth Amendment to the United States Constitution which reads: "NOR SHALL PRIVATE PROPERTY BE TAKEN FOR PUBLIC USE, WITHOUT JUST COMPENSATION" and that part of the Act of April 26, 1906, 34 Stat. 137, 142, which reads:

> "Easements * * * reserved from allotments because of the right of any railroad or railway company therein in the nature of an easement for right of way * * * may be acquired by the railroad or railway company * * * but if such company shall fail to make payment within the time prescribed by the regulations or shall cease to use such land for the purpose for which it was reserved, title thereto shall thereupon vest in the owner of the legal subdivision of which the land so abandoned is a part, except lands within a municipality title to which, upon abandonment, shall vest in such municipality."

Statement

Pursuant to the enabling provisions of the Atoka agreement of June 28, 1898, 30 Stats. 495, the Secretary of the Interior of the United States on January 31, 1901, approved the townsite of Woodville, Chickasaw Nation, Indian Territory. The name was later changed to Woodville, Oklahoma (R. 115), Exhibit two.

The town grew but at no time did its population exceed between five and six hundred people (R. 58).

By the Act of June 28, 1938 (52 Stat. at Large 1215, Chapter 795), the Congress of the United States authorized the construction of the Denison Dam and Reservoir and authorized the Secretary of War to acquire in the name of the United States such lands and easements as were necessary for the project (R. 3).

On the 29th day of January, 1945, respondent filed in the District Court of the United States for the Eastern District of Oklahoma a petition asking that the property involved herein be condemned (R. 2). The estate taken in the railroad right-of-way was the full fee simple title, except the oil, gas and other minerals, in and under the land described (R. 9). The property taken in the easements such as streets and roadways and alleys in the Town of Woodville, Oklahoma, was "a full, complete, and total extinguishment of the same" less the servient estate which had been acquired by Respondent (R. 9).

On the first day of February, 1945, the respondent filed a declaration of taking (R. 12) and on the same day the court entered an order on the declaration (R. 15).

On the 15th day of March, 1945, Woodville, Oklahoma, and New Woodville, Oklahoma, filed answer (R. 18). The answer conceded respondent had full power to take the property and requested the court to determine the value of the property taken. Petitioners set forth and plead a full and complete description of their property, except some items more fully described by the proof.

On the 19th day of April, 1945 the case came on for trial. It was stipulated and agreed that ninety days prior to the filing of the condemnation proceedings Respondent had covered the town of Woodville, Oklahoma, with water a depth of from six to thirty feet and it was impossible at that time to examine the improvements taken (R. 85).

Petitioners proved by the witness Virgil McGarr (R. 53-56) that the concrete sidewalks were four inches thick; the street-crossings nine inches thick; the concrete culverts twelve inches thick and that they were constructed in the year 1912 or 1913.

The evidence of M. U. Ayres (R. 57 to 69), Charles Howard (R. 69 to 79) and Randolph Bates (R. 79 to 84) shows that the town of Woodville, Oklahoma, owned the

property above described. A map of the town may be found at page 117 of the Record. The drainage structures are listed on Exhibit seven, sheet one and two, pages 123-125 of the Record. The concrete street-crossings are shown on Exhibit eight, page 127 of the Record. The concrete sidewalks and gravel surfacing are shown on Exhibit nine, page 128 of the Record.

An inventory had been made at the direction of the town officials of Woodville, Oklahoma, and this inventory together with the additional proof made gives a good description of the property of the town. The evidence of the engineer, Randolph Bates, is based on the other evidence and he estimated the cost of constructing like improvements as of the date of taking and deducted a fair allowance for depreciation.

The parties stipulated and agreed that the value of the railroad right-of-way land was the sum of $300.00 (R. 85).

There was no real dispute as to the property taken. Petitioners claimed they were entitled to the cost of purchasing other land of like quality in the vicinity for its streets and alleys; that on its improvements such as culverts, street-crossings and sidewalks, it was entitled to the cost of constructing them new as of the date of taking, less depreciation. As to the water well, petitioners proved the cost of obtaining water at the new location to be $1,210.00. It was also proved that the expense of digging and equipping the well which was inundated amounted to $500.00. Respondent claimed the town did not own the land abandoned by the railroad as its right of way but if the land was owned by the town, its value would be $300.00. Respondent further claimed that since it had purchased the private real property, the town was entitled only to nominal compensation for its property because the acts of Respondent had relieved the town of the burden or responsibility of maintaining such improvements.

There was no real dispute about what was done relative to the citizens of Woodville, Oklahoma, relocating themselves. There is no law in Oklahoma which provides a town or city may legally relocate itself. It does provide for organizing and dissolving a city or town (11 O. S. A., Secs. 971-984). The United States did not provide a new location. Several of the citizens purchased from Myrtle Howard, seventy acres of land for $40.00 per acre (R. 60). It was surveyed and platted into lots, blocks, streets and alleys. The plat and map of the town may be found at page 117, as Exhibit 3 of the Record. The schoolhouse, church, post-office, drug store and grocery store combined and jail were moved to the new location which was named New Woodville (R. 61). Some fifteen or twenty private residence houses were removed from Woodville, Oklahoma, to New Woodville, Oklahoma. Every building in New Woodville except one was moved from Woodville, Oklahoma. Fifty-one residents of Woodville moved to New Woodville and established themselves (R. 121, Ex. 6). The remaining residents of Woodville, Oklahoma, assigned all the cash on hand and other property of any kind to New Woodville, Oklahoma (R. 23, Exhibit B). Only three residents of Woodville, Oklahoma, that owned real property moved to New Woodville and purchased real property. No attempt was made by Respondent to pay to the town of Woodville, Oklahoma, the value of its public property and what was done relative to relocating was by the citizens who had been deprived of their public property, without compensation.

Under Oklahoma Law, 11 O. S. A. 1941, section 982, when an application in writing signed by one-third of the legal voters of a town is presented to the Board of Trustees an election may be called to determine whether the town shall be dissolved. If a majority at the election vote "yes" and they constitute two-fifths of the legal voters, the town shall be dissolved after the expiration of six months from said

date. The property beloning to the town, after the payment of all its debts and liabilities, shall be disposed of in such a manner as a majority of the voters of such town at any special meeting thereof may direct. A copy of this statute is attached hereto and marked Exhibit "A."

Pursuant to the above statute an application was made to dissolve the town of Woodville, Oklahoma (R. 110, Exhibit 1). Notice was duly given (R. 110). The election showed the voters unanimously voted for dissolution (R. 112). This election was held on the 21st day of September, 1943, and therefore the town of Woodville, Oklahoma, existed until March 21, 1944.

Because of the construction of the Denison Dam across Red River it was necessary that the railroad running through Woodville, Oklahoma, be relocated. On November 15, 1943, the Railroad Company discontinued the running of its trains over the road and by March 1st, 1944 the ties and rails were taken up from the right-of-way through Woodville, Oklahoma. See agreement (R. 62).

Applicable Law

Where all of a tract of land, or unit, is taken the owner is entitled to be paid the fair market value of the same which is usually determined by the "willing buyer and seller rule." See 18 Am. Jur., Eminent Domain, Section 242, page 875; and *Roberts* v. *New York*, 295 U. S. 264, 79 L. Ed. 1429; *Sharpe* v. *United States*, 112 F. 893, affirmed in 191 U. S. 341.

When there is no market value resort must be had to other data or information to establish value. See *United States* v. *Miller*, 317 U. S. 369, 87 L. Ed. 336, headnote 3, footnote 16, page 374 and 343, respectively; *Monongahela Nav. Co.* v. *United States*, 148 U. S. 312, 328, 329, 337, 338, 37 L. Ed. 463, 468, 469, 471, 472; *Albert Hanson Lumber Co.* v. *United*

States, 261 U. S. 581, 589, 67 L. Ed. 809, 814. See also 18 Am. Jur., Eminent Domain, Sec. 240, page 873.

Where only a part of a tract of land, or unit, is taken the owner is entitled to the value of the part taken plus any damage to the part left remaining or less any benefits to the part not taken. If the part not taken is damaged it must be added to the value of the part taken. If the part not taken is enhanced in value this may be deducted from the value of the part taken. See, *United States* v. *Miller*, 317 U. S. 369, 87 L. Ed. 336, headnote 5, footnote 21, pages 376 and 344 respectively; annotation in 145 A. L. R. 19; *Bauman* v. *Ross* (1897), 167 U. S. 548, 42 L. Ed. 270, 17 S. Ct. 966; *Reichelderfer* v. *Quinn* (1932), 287 U. S. 315, 77 L. Ed. 331, 53 S. Ct. 177, 83 A. L. R. 1429; *Aaronson* v. *United States*, 65 App. D. C. 14, 79 Fed. (2nd) 139. Also Congress by the Act of July 18, 1918, Chap. 155, Sec. 6, 40 Stat. at L. 911, 33 U. S. C. A. Sec. 595 provided that in taking property by Eminent Domain any benefits to the remainder should be considered by way of reducing the compensation for what is taken.

When the United States takes property, by the power of eminent domain, it does so in its own sovereign capacity without reference to the desires or consent of the State or any municipal subdivision thereof, subject only to the limitations contained in its own Constitution relative to "Just Compensation." See *Chappell* v. *United States*, 160 U. S. 499, 510; *United States* v. *Gettysburg Electric Ry. Co.*, 160 U. S. 668, 679; *Town of Bedford* v. *United States*, 1 Cir., 23 Fed. (2nd) 453; *Town of Nahant* v. *United States*, 1 Cir., 136 Fed. 273, 275; *United States* v. *Town of Nahant*, 1 Cir., 153 Fed. 520.

The United States can no more take the property of a municipality, without paying for it, than it can the property of a private individual. See, 18 Am. Jur., Eminent

Domain, Sec. 171, page 805; *Bedford* v. *United States*, 23 Fed. (2nd) 453; *Nahant* v. *United States*, 136 Fed. 273; *United States* v. *Town of Nahant*, 153 Fed. 520; *United States* v. *Wheeler Township*, 66 Fed. (2nd) 977; *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312.

The abutting property owners, under Oklahoma Law, own the fee title to the streets and ways subject to the right of the city or town to the full equitable use of such easements. See 11 O. S. A. 659; *Joy* v. *Kizziar*, 169 Okla. 642, 38 Pac. (2nd) 493; *Merriweather* v. *State*, 53 Okla. Cr. 420, 12 Pac. (2nd) 707; *Salyer* v. *Jackson*, 105 Okla. 212, 232 Pac. 412; *Mean* v. *Callerson*, 28 Okla. 737, 116 Pac. 195. See also 11 O. S. A. 660.

Specification of Errors to be Urged

The Court below erred:

1. In holding the Town of Woodville, Oklahoma, or its assignee, was entitled to only nominal compensation for its easements and improvements taken by Respondent.

2. In holding Woodville, Oklahoma, or its assignee, was not the owner of the fee title to the 15.74 acres abandoned railroad right-of-way.

Reasons for Granting the Writ

1. ONE OF THE MOST IMPORTANT AMENDMENTS TO THE UNITED STATES CONSTITUTION IS INVOLVED. Here the Respondent took property with a sound value of $13,346.89 and the courts below have held that "the perfect equivalent" of this property is the sum of $1.00. At first blush it is apparent they have departed from natural justice.

There is not a decision in the books that has reached such an absurd result. This situation has been brought about by the court below applying the rule of compensation when

there is a partial taking to a case where the entire tract or unit is taken.

When all of a tract or unit is taken it is only necessary to appraise or value the property taken. However, in the event only a partial taking is involved, the compensation may be nominal or it may greatly exceed the value of the property taken. The authorities relied upon by the courts below all deal with partial taking.

If Respondent should take from an individual by eminent domain, eighty acres of a 160-acre tract, the compensation might be only nominal for the reason that the part taken caused the value of the remainder to be worth as much as the entire 160 acres originally. See cases cited *supra*. Likewise, if respondent or any other legal entity, takes only a part of the public property of a town or city, the compensation might be only nominal or it might greatly exceed the value of the public property actually taken.

It does not follow, however, that if Respondent or any other legal entity, possessing the power of eminent domain, takes *all* of a tract of land or all the public property of a city or town, that the same rule of compensation would be applied as in a partial taking. In order to comply with the Fifth Amendment, it would be necessary that the market value be paid for the property. In the event the "market value" is not ascertainable or there is no "market value," then resort can be had to any other data or information. The opinion below shows on its face that the Court attempted to arrive at "Just Compensation" by applying a "partial taking" rule to a case where the entire property was taken.

If this court affirms this rule by denying Certiorari, it will be saying that by taking all the real estate in a city or town, a condemning authority becomes entitled to all the public property of the city or town.

The Court below stated, "Had New Woodville been a relocation of Woodville, we would have an entirely different problem." Here Respondent took without any payment to Woodville, Oklahoma, all its public property thereby leaving it without any means to relocate itself and the citizens without any means of relocating themselves and after doing this they state in effect, "since you were unable because of our wrongful act to relocate yourself we will just pay you $1.00 for all your property."

Cities and towns in Oklahoma own the public property as a legal entity. They may maintain actions for obstructions and any other injury to their property. The citizens do not own the property. True, they may use it and it is for their benefit but they have no title in the property. They must express themselves through the city or town. In the absence of a special injury the citizen may not sue to restrain an obstruction to a street or sidewalk. See *Clough v. City of Sapulpa*, 42 Okla. 216, 140 Pac. 1155.

The decisions below do not consider the rights of non-owners of real estate. All the citizens of a town pay the taxes that build and construct the public property. The tax may be direct and it may be indirect. It is true the public property tends to enhance the value of the real estate. However, it does not make "market value." The "market value" is determined by the supply and the demand. If the supply is greater than the demand then the private real estate, improved and vacant, will have a low "market value." On the other hand if the demand exceeds the supply the "market value" will be very high. Respondent, and any other authority takes the private real estate, improved and vacant, at the "market value." If the "market value" is low they take it low and pay a low price for it. If the "market value" is high they pay a high price for it. The

value of the public property, therefore, does not reflect itself in the private real estate of the town.

What is "the perfect equivalent" for the public property of a town, when the entire town is taken. This court in the case of *Brown* v. *United States*, 263 U. S. 78, held the best method of compensating for a town would be a substitute townsite and allowed the United States to take property for that purpose under its right or power of eminent domain. Therefore when the Condemning Authority does not furnish a substitute townsite with equal facilities it should be required to pay the cost of purchasing such a townsite and the cost of constructing equal facilities. This cost can be ascertained by determining the cost of constructing the improvements taken, less depreciation, and by the cost of replacing the streets and alleys with other land nearby.

This court held in the case of *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312, that the compensation is not to the person but for the property. It is perfectly absurd, when all the public property of a town is taken, for the courts to inquire as to whether there is any obligation on the part of the town to replace the public property. "Just Compensation" is not for and in consideration of the condition of the owner, and his predicament has nothing to do with "Just Compensation."

Applying this same reasoning to a private taking, it would seem a man with a large family would be entitled to more than a single man or woman because "the obligation" would enter into a consideration of the case.

2. THE DECISION OF THE COURT BELOW IS IN CONFLICT WITH THE DECISIONS OF OTHER CIRCUIT COURTS OF APPEAL. The issues here are not factual. They are legal. The writers do not see how the fact of relocation could have any bearing on this case. However it is submitted that the admitted facts do show a relocation and the court is referred to the admitted

facts set forth in the statement above. The facts are not in dispute. The legal conclusions reached from the facts are in dispute. Petitioners therefore assail the finding by the trial court that there was not a relocation of the town of Woodville, Oklahoma. However, the argument hereafter is based solely on the proposition that the "measure of compensation" applied by the court below is erroneous.

The following decisions of Circuit Courts have a bearing on the question before the court, to wit:

Town of Nahant v. *United States*, 136 Fed. 273;
United States v. *Town of Nahant*, 153 Fed. 520;
Town of Bedford v. *United States*, 23 F. (2d) 453;
United States v. *Wheeler Township*, 66 F. (2d) 977;
Jefferson County, etc., v. *Tennessee Valley Authority*, 146 F. (2d) 448;
Mayor and City Council of Baltimore v. *United States*, 147 F. (2d) 786;
United States v. *Des Moines County*, 148 F. (2d) 448.

In the *Town of Nahant* cases, *supra*, the United States condemned certain land in the town for Coast Defense purposes and in the taking, all roads and easements were included. The town filed its application to be made a party. This application was granted and it filed answer claiming compensation for easements for roads and sewer lines laid under the public streets and roads. The lower court held the town not entitled to compensation. See same case in 128 F. 185. The town appealed and the First Circuit Court of Appeals reversed, holding the property protected by the Fifth Amendment to the United States Constitution. The Court held the United States took the property by reason of its paramount right of eminent domain and without regard to state law, citing the case of *Kohl, et al.*, v. *United States*, 91 U. S. 367, 23 L. Ed. 449 and *United States* v. *Gettysburg Electric Railway*, 160 U. S. 668, 40 L. Ed. 576.

The Court held the United States was a complete stranger to the town and not entitled to exercise any privilege the State of Massachusetts might have even though the State consented to the taking. The lower court refused to allow the town to prove its damages and the case was before the Circuit Court of Appeals on offers of proof. The Court stated the offers of proof were insufficient to enable it to render judgment and remanded the case for further proceedings. The Court did however discuss the rule of compensation in such a case. It stated at page 283:

> "If we were to undertake to anticipate and determine all possible questions upon these general offers of proof we should have to consider the view expressed by Justice Brewer in the Monongahela Navigation Company case, 148 U. S. 312, 326, 13 Sup. Ct. 622, 37 L. Ed. 463 that the constitutional combination of the two words "just compensation" means a full and perfect equivalent for the property taken and that the just compensation is for the property and not to the owner, which, according to the view of the Supreme Court in that case, takes a situation like this from the rule which permits benefits to the owner to be deducted from the values in ascertaining the measure of damage to which he is entitled."

The Court further discussing the measure of compensation held that the franchise value of the city would not enter into the measure of compensation. The Court continuing, page 284, stated that although improvements usually were valued with the land the rule would be different when the property of the town was legally resting on property belonging to another. The court, on the question of measure of compensation stated, page 284:

> "just compensation for property actually taken is to be ascertained by reference to its capabilities and uses in connection with the part not taken, or (Lewis on Eminent Domain, Sec. 471, 471a) by ascertaining the

> difference between the value of the whole property before the taking and the value of the remainder after the taking, or by ascertaining the value of the part taken together with the damage resulting to the parts of the system outside of the territory taken, by reason of the interruption or severance."

On the question of the amount of compensation the court concluded by saying, page 285:

> "Any view which would give the town just compensation for its property taken would answer the requirement of the Constitution."

Upon being remanded the case was tried again and resulted in a verdict in favor of the Town of Nahant and the United States appealed. The case is reported in 153 Fed. 520.

The court's attention is directed to the fact that in these cases the ordinary rules for "just compensation" were used. This was a partial taking. The town was allowed the cost of relocating its sewer system. The court applied the partial taking rule because it was a partial taking. The compensation was more than the value of the property taken.

In the case of *Town of Bedford* v. *United States*, First Circuit, 23 Fed. (2d) 453, the United States took by condemnation 400 acres of land in the town. In the tract of land there was a road maintained by the town from time immemorial and maintained at the expense of the town. The taking cut out about one-half mile of the road but the severance made it necessary that new roads be built. The parties stipulated that in the event the town was entitled to recover, the amount should be $10,000.00. This was a partial taking only. The court held the easement was compensable under the Fifth Amendment to the United States Constitution; that the United States was a complete stranger to the town.

In the case of the *United States* v. *Wheeler Township*, 8th Circuit, 66 Fed. (2d) 977 the United States and Canada entered into a treaty to regulate the water level of the Lake of the Woods which provided for a raising above the natural level. Under the treaty the United States was to acquire perpetual flowage rights on land in the United States up to 1064 above sea datum. Having failed to agree on a purchase price with some of the owners, a condemnation suit was filed and Wheeler Township was made a party. This was a partial taking. The court, after holding the acquiring by the United States was not in aid of Navigation, held the easements for roads were private property within the Fifth Amendment to the Constitution; that the United States was a complete stranger to the town. In discussing the measure of damages the court held the roads as they existed were not up to the minimum required by law and held the township entitled to recover the difference in cost between building and maintaining "reasonable passable roads" required of the township by law and such cost at the artificial level of the lake.

Thus by this case an entirely new or different theory was used to determine "just compensation."

In the case of *Jefferson County, Tennessee* v. *Tennessee Valley Authority, supra,* the Authority constructed a dam across the French Broad River and thereby obliterated 95 miles of improved public highways. The parties entered into an agreement whereby a survey was made to ascertain what part of the road system would be destroyed and also to ascertain highway needs of the county after the construction of the dam. The parties agreed to the relocation and construction of such highways at the expense of the Authority, which agreement was performed. The county sued for a declaratory judgment and the Authortiy answered stating it had, at its own expense, furnished substitute roads equal to

those taken. The court found that the substitute roads were a perfect equivalent for the property taken. Attention of the court is directed to that part of the opinion which reads:

> "The political subdivision cannot deal in its roads and highways as a private corporation and thus when such property is taken by the Federal Government, just compensation cannot be measured by the same standards as compensation for the taking of purely private property."

In the case of *Mayor and City Council of Baltimore* v. *United States, supra* the city claimed it was entitled to the full value of the streets and alleys on a basis of so much for a square foot and the abutting owner entitled to a nominal amount of $1.00. The United States claimed since the streets had not been improved and, in fact, were in existence only on paper the city was entitled only to nominal compensation of $1.00. The court held with the United States stating the two interests, that of the city and the abutting owner, could not be consolidated for the purpose of "just compensation" and each would be considered separately and since it would be unnecessary to construct other roads because of the taking and since the city was not in fact damaged only nominal compensation should be allowed.

In the case of *United States* v. *Des Moines County*, 148 Fed. (2d) 448, the United States took some roads and bridges for military purposes. The county proved as its damages the cost of replacing the roads taken. This was a partial taking. The court held this was not the measure of "just compensation" and further held the correct measure of compensation was the cost of providing substitute roads in order for the county to readjust its road system. The United States claimed the county was entitled only to nominal compensation because there existed no "legally

enforceable duty" on the part of the county to furnish substitute roads. In answering this contention the court stated:

> "WE DO NOT AGREE. Nothing can be gained by a discussion of the statutes of Iowa relating to roads. If the taking by the United States of the roads in suit necessitates the building or improvement of other roads, they will have to be built or improved by the appellees out of State Funds unless the United States pays the expense. We have no doubt of the existence of the duty of the appellees to provide for a necessary readjustment of their road system. Whether the duty is express or implied or one which arises from necessity, we regard of no legal consequence."

In the case before the court, the improvements, water well, and easements were all considered together and the Court below held only nominal compensation could be recovered because there was no legal obligation on the part of the town to furnish substitute roads, and other improvements taken. Of course, it is true, if the town does not receive any compensation for its property there would be no legal obligation on its part to do anything. As a matter of fact it is rendered helpless to do anything. However, if the town does receive compensation it would be distributed as provided by the statute above. The obligation is not on the town. The obligation is on the Condemning Authority to pay for what it takes. The compensation is for the property and not to the person.

Thus, from the decisions above, it is apparent there is a conflict. The two *Town of Nahant* cases held the ordinary rules applicable for the taking of private property would apply when municipal property is taken and since the taking was only a part, that rule was applied. The *Town of Bedford* case follows these cases except it allowed for an easement. The *Wheeler Township* case, on a partial taking,

held the compensation based on "the legally compellable duty" of the township to build and maintain roads in the future. The *Jefferson County, Tennessee*, case held the ordinary rules applicable to the taking of private property would not apply when municipal property is taken. The *City of Baltimore* case held the city could not claim compensation by consolidating the equitable interest of the city with the title of the abutting owner and recover compensation on a square footage basis. The streets and alleys in that case however existed only on paper and there was no actual damage to the city. In the *Des Moines County* case the court refused to follow the "legally compellable duty" theory and said "whether the duty is express or implied or one which arises from necessity, we regard of no legal consequence". The decisions are in conflict. True all of them, except the case before the court, are "partial taking" cases. In addition to this conflict the case before the court applies a rule for taking only a part of the unit to a case where the "entire unit is taken".

In the immediate future there will be many towns inundated. The Federal Government and other legal entities will be harnessing the power in the streams. Flood Control and Hydro-Electric Power are soon to be a part of our economy. This court should take jurisdiction and settle the law so all will know their rights and duties. This Court in the case of *United States* v. *Miller*, 317 U. S. 369, 87 L. Ed. 336, did that very thing and it has been helpful to the officials of Government as well as to litigants and to the lower courts.

The Abandoned Railroad Right-of-Way

The decision of the Court below is in conflict with a prior decision by that Court and is in conflict with the basic law relative to abandonment by railroads, of their right-of-

ways. The Circuit Court reversed the judgment of the District Court.

An easement was granted to the predecessor of the St. Louis-San Francisco Railway Company by Section 13 of the Act of February 28, 1902 (32 Stat. 43, 47), which section authorized any railway company organized under the laws of the United States, or any state thereof, to take land in the Choctaw and Chickasaw Nations for right-of-way, terminals, and depot grounds. Section 15 required the Choctaw and Chicksaw Nations to be paid just compensation for any lands taken under the Act. The St. Louis-San Francisco Railway Company, or its predecessors in title, never paid for the right-of-way appropriated under the Act.

The 15.74 acre tract involved herein was possessed under the above authority, and thereafter was used for railway purposes until it became necessary to relocate the line because of the Denison Dam Project. The tract lay wholly within the town limits of Woodville. As the water of the Denison Dam Project would inundate the right-of-way, the United States agreed to relocate the line in consideration of the Railway Company surrendering and conveying the tract of land, with other land, to the United States. The consideration, that is, the relocation, was carried out by the United States and it became the owner of whatever right the railway had in the tract. The Railway Company discontinued service to the public on said line, November 15, 1943, and thereafter the line was used solely for the benefit of the company in removing the rails and other materials, which removal was completed by March 1, 1944 (R. 44-45).

A number of the residents and citizens of Woodville continued to live therein until its dissolution. Presumptively the city officials performed their duties during that time (R. 45).

Where the right-of-way is only an easement, and it ceases to be used for the purposes of the easement, the right to possession of the right-of-way reverts to the original land owner, or his successor in interest. See *United States* v. *Magnolia Petroleum Company*, 10 Cir. 110 F. (2d) 212, 217 and cases cited; 44 Am. Jur. Railroads, Sec. 109, page 323. It is immaterial whether the Railway Company or its transferee ceases to use it for the purposes of the easement.

In the case before the court, as the right to the use was derived from the Choctaw and Chickasaw Nations and under Sec. 13 of the Act of February 28, 1902 (32 Stat. 43, 47), the conditions of the reversion, and the one to whom the possession will revert in the event of abandonment, are determined by the applicable Act of Congress. Under the provisions of Section 14 of the Act of Congress of April 26, 1906 (37 Stat. 137), whenever there is a definite cessation in the use of the land for railway purposes, it reverts, if the tract is within a municipality, to such municipality. See *United States* v. *Magnolia Petroleum Co.*, *supra*.

In the case before the court the use of the right-of-way for transportation ceased on November 15, 1943, and the possession of the way reverted as of that day. On such day, notwithstanding the United States had purchased all the lots and area of Woodville, a portion of its residents continued to reside therein, and the city authorities continued to function and the town of Woodville was a municipality at such time, capable of receiving, and did receive, title to the abandoned right-of-way.

A municipal corporation does not lose its existence by misuser or nonuser of its powers and franchises. The Legislature of Oklahoma has prescribed by statute for the incorporation and dissolution of municipal corpora-

tions. 11 O. S. A. 971, *et seq.* In other states prescribing by similar statutes for the incorporation and dissolution of municipalities, it has been determined that a corporation does not lose its existence by nonuser of its powers and franchises. *Ringling* v. *City of Hemstead*, 193 F. 596, 5 Cir.; *Elliott* v. *Pardee*, 86 P. 1087 (Cal.); *Beale, Mayor* v. *Pankey*, 57 S. E. 661 (Va.); *Boone County* v. *Town of Vernona*, 227 S. W. 804 (Ky.). In the light of these authorities, it is not reasonable to presume that the Federal Government by condemning all of the land within the limits of a town, may by such act terminate the town's municipal powers and capacity to receive or preserve its assets.

The fee simple title vested in the town of Woodville upon abandonment. Thereafter this title, less mineral rights, was taken by Respondent. The question here is one of title. There is no question of "measure of compensation" for the reason the parties agreed upon the value.

True, it is a windfall, but any abutting owner to a strip of land upon abandonment receives the additional land as a windfall since the abutting property was purchased or acquired subject to the easement. The fact a municipality or an individual receives a strip of land because of an abandonment does not deprive them of their title and it should not be taken without payment of just compensation. The town of Woodville did not do anything that brought about this abandonment. It became the owner of the strip of land just the same as if it had received a patent for it. Should Respondent take this land without paying for it simply because its acts in connection with other activities caused the railroad company to abandon the land? The writers know of no such rule of law.

Conclusion

Wherefore, it is respectfully requested that this petition for a writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit be granted.

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